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No. 02-371

IN THE SUPREME COURT
OF THE UNITED STATES

Commonwealth of Virginia,

Petitioner,

v.

Kevin Lamont Hicks,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May an individual charged with trespass for being on streets adjacent to a public housing project raise a First Amendment overbreadth challenge to a policy that grants government officials unfettered discretion to choose who may have access to those streets?

2. Does a government policy of excluding the public from streets and sidewalks adjacent to a public housing project violate the First Amendment on the ground that it is not narrowly tailored to serve a compelling government interest?

3. Does the government policy of excluding the public from a housing project and the streets and sidewalks surrounding it violate the constitutional right of freedom of association?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Kevin Lamont Hicks was convicted of trespass for walking along a street adjacent to a public housing project in Richmond, Virginia. Hicks had been barred from entering the housing project and adjacent streets under a government policy that granted the manager of the housing project, Gloria Rogers, permission to exclude any nonresident who could not demonstrate "a legitimate business or social purpose for being on the premises." Pet. App. 4-5. At a hearing, Ms. Rogers explained that she was free to permit or deny anyone, including religious groups, leafleters, and protestors, from using the streets surrounding the housing project. Hicks raised an overbreadth challenge to this policy, and the Supreme Court of Virginia reversed the conviction and invalidated the policy on the ground that it substantially impinged on constitutionally-protected expression. As shown below, that ruling is correct and does not present issues meriting review by this Court.

STATEMENT OF THE CASE

On July 23, 1997, the City Council of Richmond, Virginia authorized the closing of several streets in the area surrounding Whitcomb Court, a public housing project in Richmond. The Council conveyed those streets, as well as the adjacent sidewalks, to the Richmond Redevelopment & Housing Authority, a government entity that owns and operates this project. Pet. App. 3. The streets and sidewalks at issue surround Whitcomb Court, and are not contained within it. Pet. App. 30. Prior to their "privatization," these streets were used by the public and were similar in appearance to all other streets in Richmond. Pet. App. 30.

Although the Housing Authority erected "no-trespassing" signs along the streets, the streets were not barricaded or gated. Pet. App. 31. Indeed, some of the streets are "privatized"

for only a few blocks and are public on both ends of the "privatized" blocks. Pet. App. 37. The Housing Authority authorized the Richmond police to enforce the trespass laws of Virginia on its newly-acquired "property," and further authorized

> each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond police officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority.

Pet. App. 4-5.

Gloria Rogers, the Housing Manager for Whitcomb Court, was the official responsible for implementing this policy. Pet. App. 5. Non-residents who wish to visit Housing Authority property, including the formerly public streets and sidewalks adjacent to Whitcomb Court, must first obtain Rogers' permission. Pet. App. 5. The Housing Authority has not established any guidelines limiting Rogers' discretion to grant or deny permission to enter the property. Pet. App. 5.

Respondent Kevin Hicks does not live in the Whitcomb Court house project, but his mother, his child, and his child's mother all do. Pet. App. 32. Hicks was convicted of trespassing at Whitcomb Court in February 1998 and June 1998. Pet. App. 32. On April 14, 1998, Rogers served Hicks with written notice that he was barred from the Whitcomb Court property, and that if he was "seen or caught on the premises, [he would] be subject to arrest by the police." Pet. App. 107. Hicks twice went to Rogers' office and asked for permission to visit Whitcomb Court, but his requests were denied. Pet. App. 32. On January 20, 1999, Hicks was

stopped by a Richmond police officer while walking along Bethel Street, one of the privatized streets adjacent to Whitcomb Court, and was issued a summons for trespass. Pet. App. 6.

In April 1999, Hicks was tried and convicted of trespass in Virginia district court. He then appealed to the Circuit Court of the City of Richmond, where he was to receive a trial *de novo*. Before that trial, Hicks moved to dismiss the trespass charge on the ground that the policy of prohibiting the public from entering the streets surrounding Whitcomb Court violates both the Virginia and federal constitutions. The court held a 45-minute hearing on that motion, during which Rogers testified. She explained that there were no guidelines in place to implement the Housing Authority's ban on public use of the streets and sidewalks of Whitcomb Court, and that she had complete discretion over whether to permit an individual or group to walk, meet, picket, leaflet, or gather for any purpose on the privatized streets of Whitcomb Court. Pet. App. 5. The court denied Hicks' motion.

Hicks was subsequently tried and convicted of trespass and sentenced to 12 months in jail and fined $1,000, although both these penalties were suspended. Pet. App. 82-83. Nonetheless, Hicks was required to serve a 12-month sentence because his conviction on this trespass charge violated the terms of the suspended sentences imposed on him for his previous trespass violations. Pet. App. 84-85.

Hicks appealed his conviction to the Virginia Court of Appeals, where he attacked the trespass policy on its face, arguing that it was unconstitutionally vague and overbroad. He also contested the policy on the ground that it violated his right of freedom of association under the First Amendment. A split panel of that court rejected his claims, affirming the decision of the trial court. Hicks then obtained a rehearing *en banc* in the Virginia Court of Appeals, which

reversed the panel. The *en banc* court held that streets and sidewalks are public fora, and that the Housing Authority's exclusion of the public from these fora violated the First and Fourteenth Amendments. Pet. App. 43.

The Supreme Court of Virginia affirmed. The court held that the Housing Authority's trespass policy was "overly broad" because it granted a government official unfettered discretion to determine who has a right to speak on Housing Authority property, in violation of the First Amendment. Pet. App. 16-17. The court did not review the Court of Appeals' determination that the Housing Authority's policy unconstitutionally excluded the public from a public forum. Pet. App. 16.

REASONS FOR DENYING THE WRIT

In its first question presented, petitioner asks this Court to establish a new rule limiting overbreadth challenges to cases in which there is a nexus between defendant's conduct and the law's unconstitutional application. Petitioner does not claim that there is any split in appellate authority on that issue or that the Virginia Supreme Court's decision is contrary to any precedent of this Court. Moreover, petitioner itself failed to raise this new limiting principle below, and thus this petition marks the *first* occasion on which any court has been asked to consider this argument. For these reasons alone, this Court should deny review.

In addition, petitioner is unable to show a lack of nexus between the grounds for Hicks' exclusion from Whitcomb Court and the constitutionally-impermissible applications of the policy. Thus, this Court could not apply petitioner's proposed "nexus" limitation on overbreadth challenges to this case. Finally, because this case arose in state court, where Article III standing concerns do not apply, it is not the proper vehicle in which to consider additional prudential

limitations on standing to make overbreadth challenges.

In its second question presented, petitioner asks this Court to resolve a circuit split on the question whether the government has greater leeway to restrict First Amendment rights when it is acting as landlord than when it is acting as sovereign. Again, petitioner failed to raise this issue below, and thus it is not preserved for review. In any case, as explained below, any additional latitude the government may have to restrict constitutional rights when acting as landlord is irrelevant to the question whether the government may prohibit any and all speech on traditional public fora such as streets and sidewalks. None of the cases cited by petitioner holds otherwise.

Finally, the policy at issue is unconstitutional for several reasons, all of which Hicks raised below and would raise again before this Court if the petition were granted. These alternative grounds for affirmance would likely prevent the Court from addressing the questions presented, and thus provide another reason for this Court to deny review.

I. PETITIONER'S PROPOSED LIMITATION ON OVERBREADTH CHALLENGES DOES NOT MERIT THIS COURT'S REVIEW.

A. Petitioner Did Not Preserve The Issue For This Court's Review.

Petitioner asks this Court to establish a "bright line rule" for overbreadth challenges. Under it, a defendant must show "(i) that *his own* conduct involved expressive activity, and (ii) that his conduct falls within the particular prohibition he challenges as overbroad." Pet. i (question presented), 16 (emphasis in original).

In its briefs in the courts below, petitioner never proposed this new "bright line rule" and never argued that Hicks' overbreadth challenge failed because his trespass violation was unrelated to the policy's prohibition on leafleting or other speech activities. In its appeal to the

Supreme Court of Virginia, petitioner asserted *only* that Hicks' overbreadth challenge should not prevail because the policy's overbreadth was not *substantial*. *See* Va. S. Ct. Br. 22 ("Hicks has not demonstrated a 'substantial risk' that enforcement of the policy 'will lead to the suppression of speech.'") (*quoting National Endowment for Arts v. Finley*, 524 U.S. 569, 580 (1998)). Because petitioner never previously raised this objection at any level below, it should not be permitted to do so for the first time before this Court. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2001); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Duignan v. United States*, 274 U.S. 195, 200 (1927). Thus, this Court should deny review based on the time-honored principle that the Court will not address arguments neither presented nor decided below.

B. The Facts Of This Case Prevent This Court From Addressing Petitioner's Proposal To Limit Overbreadth Challenges To Cases In Which There Is A Nexus Between The Challenger's Conduct And The Constitutionally-Impermissible Applications Of The Policy Being Challenged.

Even if petitioner had properly raised its proposed new limitation on overbreadth challenges, the facts of this case would prevent this Court from passing on that question. Petitioner asserts that 1) Hicks' offense did not involve any expressive conduct; and 2) his

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Petitioner notes that this Court has granted certiorari in *Black v. Virginia*, 553 S.E.2d 738 (2001), *cert. granted*, 122 S. Ct. 2288 (2002), in which the Supreme Court of Virginia struck down a cross-burning statute as overbroad. Pet. 20 n.11. Significantly, the Commonwealth of Virginia's petition for writ of certiorari in that case did not raise, or even suggest, applying the novel limitation to overbreadth challenges asserted in this petition. Instead, that petition attacked the decision on the ground that the statute at issue did not prohibit constitutionally-protected expression. *See, e.g.*, Petition for Writ of Certiorari 28 n.16, *Virginia v. Black*, No. 01-1107 (explaining that overbreadth, in a "conventional sense," refers to attacks on a "statute which by its terms bans protected speech," and arguing that the statute at issue did not reach protected speech).

conduct was not proscribed by "that portion of the government policy he challenges as overbroad, but by *other* portions of the policy." Pet. 13 (emphasis in original). The first point is disputable and the second point is incorrect.

1. Petitioner argues that "[t]here is no evidence that the notice barring [Hicks'] return was related to any previous expressive activity." Pet. 13. Nor, however, is there any evidence to the contrary. Neither this Court, nor Hicks, nor the Commonwealth of Virginia for that matter, can possibly know why Hicks was barred from Whitcomb Court because the Housing Authority's policy authorizes its Housing Manager to prohibit anyone from entering the streets surrounding Whitcomb Court for any reason, without explaining why. From the record in this case, we know only that Hicks was notified that he was barred from these streets, and that his two oral requests to have that bar lifted were denied. The absence of evidence explaining why Hicks is barred from the area is part and parcel of the trespass policy's constitutional defect: Because the Housing Manager has unfettered discretion to choose who can have access to the streets and sidewalks around Whitcomb Court, she need not create any record reflecting the basis of her decision to bar Hicks, or anyone else, from that property.

2. Contrary to Petitioner's assertion, Hicks was arrested for violating the very same provisions of the policy that he challenges as overbroad. The Housing Authority's written policy authorizes "each and every Richmond Police Department officer" to first put on notice, and then arrest, "any person" found on Whitcomb Court's newly-privatized streets who "cannot demonstrate a legitimate business or social purpose for being on the premises." Pet. App. 98. The Supreme Court of Virginia struck down the policy on the ground that Rogers, the Housing Authority's agent, has "unfettered discretion" under the policy to determine who has a

"legitimate business or social purpose" and who does not. Pet. App. 13-16. She exercised that discretion to bar Hicks from the property and to refuse his requests to be allowed to return, and it was these decisions that led to his conviction for trespass. Rogers is free to bar any nonresident from entering Whitcomb Court for any reason, or even no reason at all, regardless of their purpose in being there. Thus, the very same policies and procedures that led to Hicks being barred from Whitcomb Court can be applied to bar individuals who wish to engage in constitutionally-protected activity on that property.

C. This Court Cannot Establish Prudential Limitations On Standing To Make Overbreadth Challenges In State Courts.

Aside from the factual obstacles to reaching petitioner's first question presented, this case is not the proper vehicle for an examination of a defendant's *standing* to challenge a statute as overbroad because it arises in a state, not a federal, court. In making an overbreadth challenge, a party claims third party (*jus tertii*) standing to argue that a statute violates the rights of others. A party who is charged with violating a statute has standing in the constitutional sense to make a facial challenge to that statute: The party has an injury in fact, caused by the statute, that would be remedied should the statute be found unconstitutional. *See* Richard H. Fallon, Jr., "Making Sense of Overbreadth," 100 Yale L. J. 853, 869 (1991). Federal courts may, of course, establish prudential limits on standing for themselves, and if this case arose in a federal court then this Court could consider whether to narrow existing prudential limitations on standing to make overbreadth challenges. But those limits should not be imposed on the states. As this Court has explained "if a state court has reached the merits of a constitutional claim, invoking prudential limitations on [the respondent's] assertion of *jus tertii* would serve no functional purpose" because "state courts need not apply prudential notions of standing created by this Court." *City*

of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999) (internal citations and quotations omitted).

D. Petitioner's Proposed Rule Would Undermine The Role Of The Overbreadth Doctrine To Invalidate Statutes That Chill First Amendment Rights.

Putting aside the numerous factual and procedural barriers that would prevent this Court from reaching the question presented, this Court should not grant the writ because petitioner's proposed limitations on overbreadth challenges would undermine the very purpose of the overbreadth doctrine: to invalidate expansively-worded laws that chill First Amendment expression.

Overbreadth is an exception to the general rule that the party before the Court can only complain of a law's application to his or her conduct. Laws that invade First Amendment freedoms are treated differently, however, because "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). As this Court has explained:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Id. In short, the very reason for permitting facial challenges is to enable parties whose activity is *not* protected by the First Amendment to challenge laws on the ground that they have a chilling effect on the speech rights of others. Requiring a nexus between the challenger's conduct and the law's unconstitutional application is thus inconsistent with the doctrine's basic prophylactic purpose.

Furthermore, this Court has already established limits on overbreadth challenges. Such challenges can only be applied to laws that have a "substantial impact on conduct protected by the First Amendment," *Morales*, 527 U.S. at 52-53, because these laws would, if let stand, have a significant chilling effect on constitutionally-protected activity. In light of the overbreadth doctrine's prophylactic purpose, it makes perfect sense to limit its application to statutes that chill significant amounts of speech, rather than, as petitioner suggests, limiting it to defendants whose conduct is in some way related to the statute's unconstitutional application.

II. THE QUESTION WHETHER THE GOVERNMENT HAS GREATER LATITUDE TO IMPINGE ON FIRST AMENDMENT RIGHTS WHEN ACTING AS LANDLORD IS NOT PRESENTED IN THIS CASE.

Petitioner's second question presented also fails to raise an issue worthy of this Court's review. Petitioner argues that this Court should resolve the "conflict" among the federal and state appellate courts on the issue whether the government has "broader discretion" to restrict free expression when acting as landlord than when acting as sovereign. Pet. 21.

A. Petitioner Did Not Preserve This Issue For The Court's Review.

Petitioner never raised this argument below, and thus it was not addressed in any of the decisions issued by the Virginia courts in this case. Petitioner cannot reasonably criticize the lower courts for failing to "acknowledge" the purported "distinction" between government as landlord and government as sovereign when petitioner failed to do so as well. Pet. 21. Petitioner did not preserve this issue and review should be denied on that ground alone. *See, e.g., Adickes*, 398 U.S. at 147 n.2 ("Where issues are neither raised before nor considered by the court below, this Court will not ordinarily consider them.").

B. The Question Whether The Government Has Additional Leeway To Restrict Speech When Acting As Landlord Is Irrelevant To This Case.

In any case, the government's status here is irrelevant. Even if there is a constitutionally significant distinction between government as landlord and government as sovereign, it plays no role in this case, where the issue is whether the government can give itself standardless discretion to ban any and all *speech* on traditional public fora such as streets and sidewalks.

Petitioner asserts that this Court's decision in *Department of Housing and Urban Development v. Rucker*, 122 S. Ct. 1230 (2002), suggests such a distinction between landlord and sovereign. Pet. 21. In *Rucker*, this Court held that when the government is acting to deprive individuals of an interest in government property — specifically, their interest in remaining tenants in subsidized, government-owned housing — the government is subject to fewer restrictions when acting in its capacity as landlord. *Id.* at 1236. The Court relied in part on the fact that the tenants had signed leases with the government acknowledging the terms on which they possessed the property, and acknowledging that a violation of those terms could result in their eviction. *Id.* *Rucker* did not concern government restrictions on speech, and did not address the government's authority to prohibit constitutionally-protected conduct on streets and sidewalks. Moreover, if the Virginia Supreme Court had applied *Rucker's* landlord/sovereign distinction to this case, its decision would have been at odds with this Court's holding that "[r]egulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny." *United States v. Kokinda*, 497 U.S. 720, 726 (1990). In short, this Court has never held that the government can, simply by "privatizing" public streets, impose restrictions on speech that would be unconstitutional if it were acting in its capacity as sovereign rather than as

proprietor.

Petitioner cites five cases in which it contends that lower courts applied its landlord sovereign distinction to uphold trespass policies. None of these cases establishes that the government has broader discretion to restrict free speech when acting as landlord, and, more to the point, none establishes that the government can grant itself boundless discretion to prohibit speech on formerly public streets that it has purported to privatize.

a. Washington

In *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002), the Supreme Court of Washington examined a trespass policy that applied to the "common grounds" of government-owned housing and barred only those individuals who engaged in a list of prohibited activities (fighting, making loud noise, etc.). The court upheld the policy against an overbreadth challenge because it concluded that no aspect of the policy "imping[ed] on First Amendment activities." The court said nothing about the government's latitude to restrict constitutionally-protected activity when acting as landlord. Thus, the decision does not conflict in any way with that of the Supreme Court of Virginia in this case.

b. Minnesota

In *Minnesota v. Holiday*, 585 N.W.2d 68 (Minn. App. 1998), a defendant convicted for violating a trespass ordinance challenged the ordinance on overbreadth grounds. The court reversed defendant's conviction because the state's broad reading of the ordinance raised serious First Amendment concerns. The court stated that "it is true that the government . . . has the right to limit access to its property," but nonetheless held that the state could not apply the trespass ordinance to "exclude Holiday from property occupied by many individuals, covering significant

sections of the city" because such a "sweeping restriction" raised serious First Amendment concerns. 585 N.W.2d at 71. Indeed, the Minnesota Supreme Court explained that it would have been forced to invalidate the ordinance had it not found a way to narrow its construction and reverse the trespass conviction before it. *Id.* at 70-71. Therefore, the court's opinion is fully consistent with the Supreme Court of Virginia's decision in this case.

c. Sixth Circuit

Thompson v. Ashe, 250 F.3d 399 (6th Cir. 2001), concerned a public housing authority's policy of maintaining a list of individuals barred from entering the housing authority's residential rental property. Individuals were placed on the "no-trespass" list if "reliable information" demonstrated that they had been involved in drug activities or violent criminal activities that posed a threat to the residents and property. 250 F.3d at 403. Thus, the no-trespass policy at issue in *Thompson* is distinguishable from Richmond's policy because it was limited to individuals who were involved in criminal activities and who entered the residential property itself, rather than the streets adjacent to that property. Moreover, Thompson did not raise an overbreadth challenge to the law, but instead claimed, *inter alia*, that the policy violated his right to associate with his family. The Sixth Circuit upheld the policy without declaring that the government had broader latitude to impinge on First Amendment rights in its capacity as landlord. Thus, the decision does not create a conflict with the holding below, and, more to the point, does not remotely raise the landlord sovereign distinction upon which petitioner seeks review.

d. Eleventh Circuit

In *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994), the Eleventh Circuit upheld a

trespass-after-warning statute specifically because it applied only to the housing authority's residential property itself, not the streets and sidewalks around that property. *Id.* at 548 n.3 ("Although access to the Housing Authority property is limited, the City-owned streets and sidewalks surrounding and intersecting with the Housing Authority property are open to the public."). Because residential property, unlike streets and sidewalks, are not public fora, the court concluded that individuals did not have a right to engage in First Amendment expression on that property. Thus, *Daniel* does not conflict with the decision by the Virginia Supreme Court in this case. *See* Pet. App. 39 (distinguishing *Daniel* from this case because the public had "unlimited access to the city-owned streets and sidewalks adjacent to the housing complex.") (citing *Daniel*, 38 F.3d at 550).

c. Vacated Fifth Circuit Panel Decision

A panel of the Fifth Circuit struck down a trespass-after-warning statute as an unreasonable restriction on the First Amendment rights of residents to receive information, a decision that has subsequently been vacated for *en banc* review. *Vasquez v. Housing Authority of the City of El Paso*, 271 F.3d 198, 203 (5th Cir. 2001), *vacated and reh'g en banc granted sub nom. De La O v. Housing Authority*, 289 F.3d 350 (5th Cir. 2002). Because that decision has been vacated, it cannot establish a split in authority on any issue. In any case, the Fifth Circuit panel's decision *striking down* the statute on First Amendment grounds certainly does not provide any authority for petitioner's view that the Richmond policy is constitutional.

* * *

As the above review demonstrates, none of the cases cited by petitioner supports the view that the government has greater latitude to restrict First Amendment rights on streets and

sidewalks that it has purported to privatize. That is not surprising, because the government's status as landlord is irrelevant to its authority to restrict constitutionally-protected activities on traditionally public fora such as streets and sidewalks.

III. RESPONDENT HAS RAISED SEVERAL OTHER CHALLENGES TO THE TRESPASS POLICY THAT WOULD PREVENT THIS COURT FROM REACHING THE QUESTION PRESENTED.

Hicks' overbreadth challenge is only one of several grounds on which Richmond's policy is unconstitutional. Below, Hicks argued 1) that the policy was an unconstitutional infringement of First and Fourteenth Amendment rights because it regulated speech and activity in a public forum and was not narrowly tailored to achieve a compelling government interest, Hicks S. Ct. Br. 11-12; and 2) that Richmond's policy violate the right to intimate association guaranteed by the First and Fourteenth Amendment, *see* Hicks' S. Ct. Br 17-22. If this Court grants the petition, Hicks will raise these other grounds as a basis for affirming the decision below, which could prevent this Court from reaching the question presented. These alternative grounds for affirmance provide yet another reason for this Court to deny the petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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